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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-273

ROSALYN COLODNY and JEAN FELDMAN,
Applicants,

versus

R. A. KRAUSE, AS NOMINEE OF THE
TRUSTEE OF ATICO MORTGAGE INVESTORS
A MASSACHUSETTS BUSINESS TRUST,
Respondent.

On Petition for Writ of Certiorari to the
United States Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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The Respondent opposes the Petition for Writ of Certiorari.

REASONS FOR DENYING WRIT

Petitioners claim that they have been held liable in a Georgia judgment on the basis of the South Carolina judgment which was not enforceable against them. They obviously misread the Georgia court's ruling with respect to the basis of their liability in order to raise spurious constitutional violations.

The Georgia Court of Appeals clearly stated that "(T)he basis for the action against appellants (Petitioners herein) was the guaranty contract, not the South Carolina judgment." (Petitioners' Appendix, p. 16)

Petitioners were not properly served in the South Carolina deficiency judgment proceeding. (R. 46-47, 50-51, 198-201) Their Motion to Dismiss Count I of respondent's Complaint, to domesticate the South Carolina judgment, was appropriately granted. (R. 96) Count II was an action on the contract. In respect to Count II, Petitioners did *not* contest in the trial court the valuation pleaded by respondent of the security which was received in the South Carolina proceeding. Instead they filed a Motion for Summary Judgment asserting that there were no material issues of facts or law. (R. 62-92)

Petitioners' contention that they have been denied due process because they were not given notice of the South Carolina proceeding and had no opportunity to be heard in that State is without merit. The South Carolina proceeding was void as to them, and notice therein is irrelevant.

Petitioners did have notice of and a full and fair opportunity to be heard and defend in the Georgia proceeding. However, they chose not to raise any question at that hearing about the valuation.

Respondent in its claim in Count II against Petitioner on the guaranty offered as a reduction of its claim the value of the security received in the South Carolina foreclosure action. The Petitioners were not

bound by anything that occurred in the South Carolina proceedings, but they pleaded and offered no proof to the contrary on the valuation of the security. Moreover, Petitioners, like Respondent, moved in the trial court for a summary judgment on the suit on the guaranty claiming that there were no genuine issues of fact, i.e., they accepted and did not contest the valuation of the security received by Respondent, as pleaded and proved in the corresponding Motions for Summary Judgment. If the Petitioners wished to contest the valuation assigned by the South Carolina foreclosure proceedings they should have alleged or offered proof of a valuation they considered fair. No such allegation or offer of proof was ever made. The Georgia statute cited by Petitioners (Petitioners' Brief, p. 4) concerning confirmation of sales* is not relevant for it applies only to foreclosure sales in Georgia. *Goodman v. Nadler,* 113 Ga. App. 493, 148 SE 2d 480 (1966)

The present decision is in complete accord with this Court's decisions in the cases cited in Sections 1 and 2 of Petitioners' Brief. Petitioners were not denied due

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* Georgia Code Annotated on this subject reads as follows: "67-1503. *Confirmation of sales and powers* — When any real estate is sold on foreclosure, without legal process, under powers contained in security deeds, mortgages or other lien contracts, and at such sale said real estate does not bring the amount of the debt secured by such deed, mortgage, or contracts, no action may be taken to obtain a deficiency judgment unless the person instituting the foreclosure proceedings shall, within 30 days after such sale, report the sale to the judge of the superior court of the county in which the land lies for confirmation and approval and obtains an order of confirmation and approval thereon."

process of law. *Carter v. Kilber*, 64 S. Ct. 1, 320 U.S. 243 (1943), cited by Petitioners as analogous, illustrates this. In *Carter*, a bankruptcy proceeding in which the valuation of a piece of property was at issue, the Commissioner, who was appointed by the district court, made findings of value based in part on his own independent examination and analysis of the property, without an opportunity by the parties to rebut the evidence obtained during the course of his examination. The district court cured this error by examining all the competent evidence before the Commissioner and modified his valuation. The case is not in point. There, the parties tried in the lower court to contest a valuation. In the present case, Petitioners offered no proof or even allegations that the valuation of the security as pleaded by Respondent was incorrect. Petitioners cannot convert this case into one warranting review in certiorari because they failed to take advantage of their opportunity to be heard.

Finally, the Georgia Court of Appeals' rejection of the doctrine of res judicata as a bar to Respondents' cause of action was not a denial of due process.

Before a judgment is res judicata it must be a valid judgment. If it is void, i.e., a judicial nullity, it is subject to collateral attack at any time and in any proceeding. *Hansberry v. Lee*, 311 U.S. 32, 61 S. Ct. 115 (1941). In response to Count I of Respondent's Complaint, Petitioners themselves attacked the validity of the South Carolina judgment against them and the Georgia court held that judgment void. As the judgment was an absolute nullity and not final as to them, it could not possibly be res judicata.

Petitioners' argument that the South Carolina judgment can be domesticated in any state of the Union and asserted against them, and that there are two valid judgments against them on the same claim and that this is a violation of due process of law, has absolutely no merit. The Georgia Court of Appeals has already held that the South Carolina judgment was void as to Petitioners. The only valid judgment is the one entered in the lower court in Georgia on an original action on the guaranty. See *Treinies v. Sunshine Mining Co.*, 308 U.S. 66, 60 S. Ct. 44 (1939).

As the South Carolina judgment was void, it could not be asserted against Respondent as a bar to the Georgia action.

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served copies of RESPONDENT'S BRIEF IN OPPOSITION by placing such copies in an envelope, with adequate postage thereon, addressed to:

Ruby Carpio Bell
Bell & Desiderio, P. C.
3445 Peachtree Road, N. E.
Suite 900
Atlanta, Georgia 30326

This ____ day of September, 1977.

KIDD, PICKENS & TATE

Charles M. Kidd,
Attorney for Respondent